These rules would seem to account for the distinction drawn between rights in the nature of easements and those in the nature of profits, for since the latter are rights to take something of value from the land, it is clear that an unduly free exercise of them might ultimately result in the exhaustion of the servient tenement.[11] This danger is obviously present in every case where a customary right is claimed, for the number of persons exercising it is limited only by the population, but it is of much less weight where the right claimed is only one of easement, a mere right to do something upon the land of another. From the view above suggested as to the origin of customary rights it follows that their existence is logically impossible in America, and in fact several American courts have refused to recognize them either upon this ground,[12] or because they consider them detrimental to the best interest of the community.[13] Others, however, taking a broader view, hold that user during the prescriptive period is proof of the existence of the custom from time immemorial.[14]

A recent case, *Earl of Chesterfield* v. *Harris* (1911) 80 L. J. Ch. 626, has presented for consideration a question depending upon these principles. The plaintiffs sought an injunction restraining the defendants, inhabitants of a certain manor, from fishing in a stream on their land. The defendants, while not seriously attempting to deny the controlling force of the foregoing rules sought to rely on an exception to the doctrine that the inhabitants of a community as such cannot acquire a *profit à prendre*. They argued that, since a grant of such a right made by the crown operates as an incorporation of the inhabitants for the purposes of the grant,[15] therefore from user from time immemorial a grant of the right and a consequent incorporation for that purpose should be presumed. Since, however, the existence of customary rights does not rest upon grant, it seems impossible to presume from the user in the principal case even a fictional lost grant from which an incorporation could be implied. In reaching this result the case is in accord with the previous authorities.[16]

EFFECT OF STATUTORY CIVIL DEATH UPON MARITAL RIGHTS.—The fiction of civil death was an expression of the purpose of the English law that those who had renounced the obligations of society by withdrawing from it or whose acts had put them under its ban, should not be entitled to the full benefits flowing from membership therein. But the fiction was always kept within the bounds of policy, and the disabilities imposed upon the different classes of such persons recognized under the early common law were by no means uniform. When, there-

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[11]See Bland *v.* Lipscombe (1854) 4 E. & B. 713.

[12]Ackerman *v.* Shelp (N. J. 1825) 3 Halst. 125; see also Post *v.* Pearsall (N. Y. 1839) 22 Wend. 425.

[13]Delaplane *v.* Crenshaw (Va. 1860) 15 Gratt. 457.

[14]Knowles *v.* Doe (1851) 22 N. H. 387.

[15]This is the accepted doctrine of the English cases. Willingale *v.* Maitland (1866) 36 L. J. Ch. 64. The right is then held by the village in trust for its inhabitants, and is not a customary right. Likewise it is held that a valid grant of a right of common may be made to an incorporated town in trust for its inhabitants. Green *v.* Putnam (Mass. 1851) 8 Cush. 21; and see Goodman *v.* Mayor of Saltash (1882) L. R. 7 A. C. 633.

[16]Chilton *v.* Lord Mayor (1878) 47 L. J. Ch. 433; Lord Rivers *v.* Adams (1879) 48 L. J. Ex. 47.

fore, this concept is incorporated in a modern statute upon which substantive rights depend, a consideration of the varying applications of the doctrine at common law is essential to the determination of the legislative intent.

The most thorough application of the idea was made in the case of those who had entered religion, who were banished or who abjured the realm.[1] Upon profession the property of the monk passed to his heirs as at his natural death,[2] though apparently his wife could not then claim dower,[3] while in cases of abjuration or banishment the wife was treated in all respects as a *feme sole*.[4] But the person of the monk was protected[5] and he was amenable to the courts for any crime he might commit,[6] and he was not precluded from holding property or suing in a representative capacity.[7] Neither civil death by abjuration nor by entry into religion, however, can now exist in England and their modern interest lies chiefly in their influence on the interpretation of statutes.

The term *"civiliter mortuus"* has also been employed in relation to one convicted of treason or felony, but it has not represented as serious an abridgment of rights in this as in the preceding instances of its use. The convicted felon cannot sue[8] and is incompetent as a witness,[9] but his incapacity to hold or devise property has proceeded not as a result of a status thrust upon him as a necessary incident of conviction, but from the common law institutions of forfeiture and corruption of blood,[10] now obsolete in England except in the case of outlawry.[11] The property of the attainted felon or traitor fell to the Crown, and it naturally followed that this property could not be transferred in derogation of the royal rights. But where no forfeiture occurred upon conviction, the person retained proprietary rights over his property.[12] So too, any immunity of the felon from suit rested solely upon the reluctance of the courts to give a judgment which must prove fruitless, and where there was no forfeiture the

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[1]Newsome *v.* Bowyer (1729) 3 P. Wms. 37, 38-*b*.

[2]Lit. 200; Co. Lit. 132-*a*.

[3]2 Pollock & Maitland, Hist. of English Law, 436; Co. Lit. 33-*b* (h); *cf.* Marsh *v.* Hutchinson (1800) 2 B. & P. 226, 231-*a*.

[4]Countess of Portland *v.* Prodgers (1689) 2 Vern. 104; Belknap's Case, Co. Lit. 132-*b*, (s); *id.* (t).

[5]Co. Lit. 132-*b*, (p), (q).

[6]2 Pollock & Maitland, Hist. of English Law, 435, 441.

[7]Co. Lit. 132-*b*, (m), (o).

[8]Bullock *v.* Dodds (1819) 2 B. & Ald. 258.

[9]Reg. *v.* Webb. (1867) 11 Cox C. C. 133.

[10]2 Hawk., Pleas of the Crown, c. 49; Duke of Northumberland's Case (1584) Leon. 21.

[11]Corruption of blood and forfeiture of realty were limited to cases of high treason, petit treason and murder by 54 Geo. III c. 145 (1814); and by 33, 34 Vict. c. 23 (1870) corruption of blood and the forfeiture of both real and personal property were abolished except in the case of outlawry.

[12]Sheppard's Touchstone, 231. Where forfeiture did not take place till office found, these rights were enjoyed till this occurred. Nichols *v.* Nichols (1576) Plowd. 477, 486.

immunity vanished.[13] As to the marriage relation, it would seem that while the wife of an attainted felon was regarded for some purposes as a *feme sole*,[14] the marriage relation was not dissolved.[15]

In the United States the chief ground for the felon's incapacity has been removed by the general statutory disapproval of forfeiture.[16] As suggested above, however, the fiction has been revived in several States by the enactment of statutes providing that one sentenced to prison for life should be deemed civilly dead. In interpreting these statutes a few cases have overlooked the true nature of the convict's disqualifications at common law,[17] but in general the courts have properly discriminated between the different classes to which the fiction was applied, and have treated these provisions as imposing the limited disabilities of the felon who did not suffer forfeiture. Thus it has been held that though a felon cannot sue[18] and cannot inherit property,[19] yet his estate does not *ipso facto* vest in his heirs and administration cannot be granted.[20]

The further question, as to the effect of statutory civil death upon marital rights, was recently raised in New York in the case of *Glielmi* v. *Glielmi* (1911) 131 N. Y. Supp. 373. After a life sentence had been imposed upon the plaintiff, his wife contracted a second marriage which under the Domestic Relations Law was not void.[21] The plaintiff's sentence having been commuted, he claimed curtesy in the wife's property at her death. Since under the common law the felon's property rights remained intact and since the marriage relation was not dissolved by civil death, the mere fact of the sentence and imprisonment would not bar the plaintiff's claim.[22] Obviously, however, the convict's position may be further qualified by legislative action. Thus in many States imprisonment is a valid ground for divorce and in several the sentence itself has the same effect.[23] So in New York a convict's situation may be affected by the statutory endorsement of a second marriage of the other spouse. This being valid, it must have the effect of placing the first marriage in abeyance,[24] and the convict

[13]Coppin *v.* Gunner (1730) 2 Ld. Raym. 1572; Baynster *v.* Truffel (1597) Cro. Eliz. 516.

[14]Newsome *v.* Bowyer *supra; Ex parte* Franks (1831) 1 M. & S. 1.

[15]See Kynnaird *v.* Leslie (1806) L. R. 1 C. P. 389, 400. Co. Lit. 33-*a* treats of a case where the wife is attainted, but the principle is obviously the same.

[16]Rankin's Heirs *v.* Rankin's Ex'rs (Ky. 1827) 6 T. B. Mon. 531; Davis *v.* Lanning (1892) 85 Tex. 39; see Kenyon *v.* Saunders (1894) 18 R. I. 590.

[17]See Troup *v.* Wood (1820) 4 Johns. Ch. 228; Williams *v.* Shackelford (1888) 97 Mo. 322, 325.

[18]O'Brien *v.* Hagan (1853) 1 Duer 664.

[19]Estate of Donnelly (1890) 125 Cal. 417.

[20]Avery *v.* Everett (1885) 110 N. Y. 317; Smith *v.* Becker (1901) 63 Kan. 541; see Coffee *v.* Haynes (1899) 124 Cal. 561.

[21]Domestic Relations Law (Consol. Laws 1909 c. 14) § 6.

[22]Co. Lit. 33-*a supra.*

[23]Wisconsin *v.* Duket (1895) 90 Wis. 272; and note to 31 L. R. A. 515.

[24]Any other conclusion would recognize the two marriages as subsisting at the same time. See Griffin *v.* Banks (1862) 24 How. 213.

could not then assert rights dependent on that relation.[25] Nor could the plaintiff's rights be restored by the commutation of sentence,[26] for this would be to ignore the long established rule that rights vested in third persons by reason of the sentence cannot be divested by a pardon. Therefore the second marriage, valid when entered into, could not be rendered void by the pardon, and as no action was brought to avoid it, the plaintiff's contention was correctly denied.[27]

[25]The situation is clearly analogous to that following divorce, and even in those States where curtesy initiate is recognized as a vested right it is barred by a suspension of the marriage relation. 2 COLUMBIA LAW REVIEW 180. Moreover, in New York curtesy initiate is a mere expectancy. Albany Co. Sav. Bank *v.* McCarty (1896) 149 N. Y. 71, 85.

[26]Commutation of sentence is seemingly treated as a pardon in the principal case. It was so regarded in Smith *v.* Becker *supra;* Bullock *v.* Dodds *supra.* But see Young *v.* Young (1884) 61 Tex. 191.

[27]Bacon's Abridgment, 250; 7 COLUMBIA LAW REVIEW 54.